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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1953

No. 439

UNITED STATES OF AMERICA,
Appellant,

VS.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.
Appellees,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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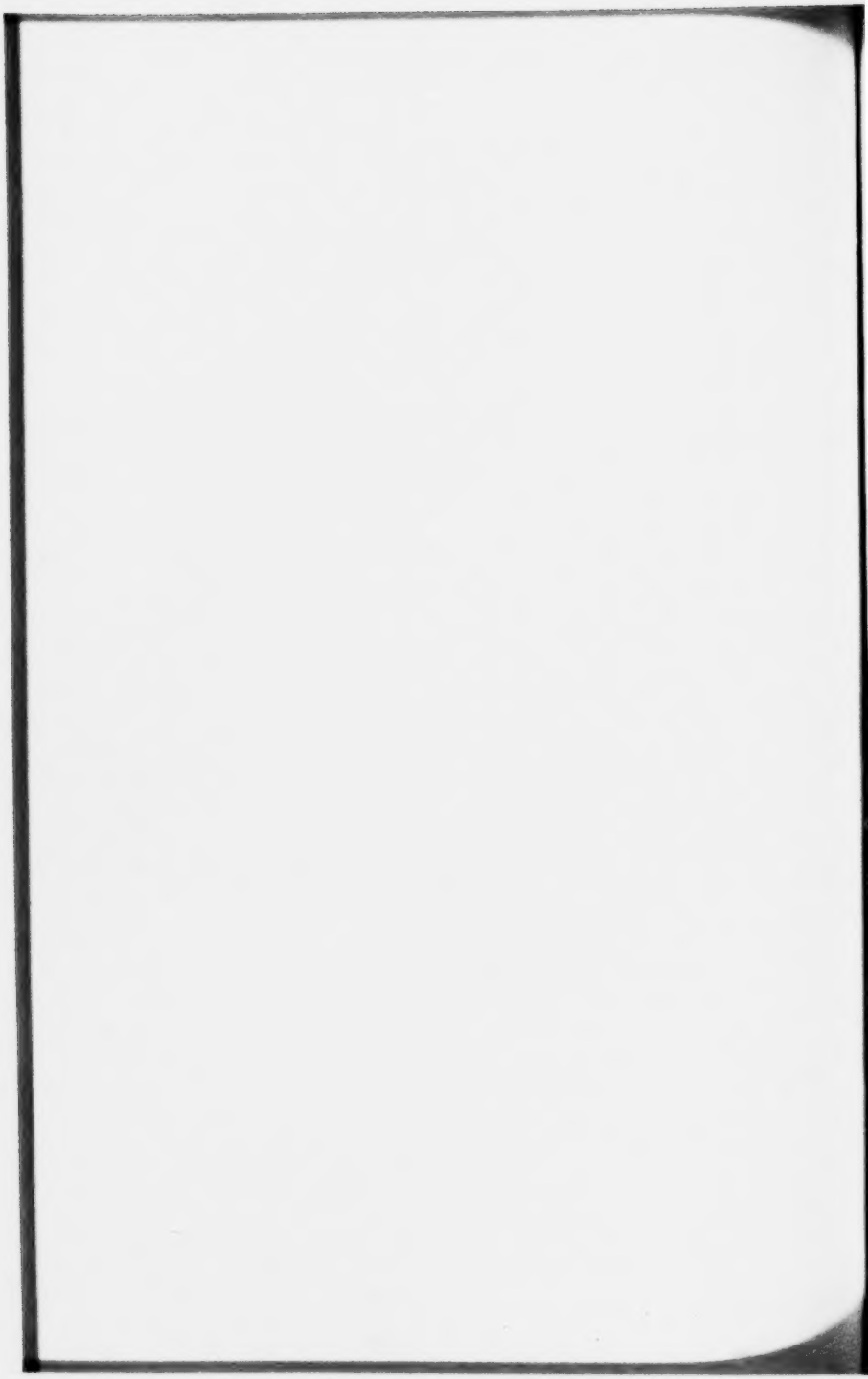
Appellee.

CHAMPLIN-SHEALY COMPANY, CHICAGO 965



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Defendant-Appellee, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, hereinafter referred to as Local 74, moves, pursuant to Rule 7 of the Rules of the Supreme Court, to dismiss the appeal herein or to affirm the judgment of the district court, on the ground that the appeal does not present a substantial question for determination by the Court.

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I.

Statement

The Government commenced this suit on July 31, 1952 by filing a complaint in equity against the Defendants-Appellees.[1] The complaint sought an adjudication that the agreements and acts alleged unreasonably restrained interstate commerce, and monopolized interstate commerce, in violation of the Sherman Act, 26 Stat. 209; 50 Stat. 693; 15 U. S. C., §§ 1 and 2. Only prospective relief—an injunction—was sought.

The trial judge found that the complaint contained no allegations showing that defendants intended to, or did in fact, restrain interstate commerce, and therefore, on July 20, 1953, granted defendants' motion to dismiss the complaint.

The Government did not ask the district court for leave to amend its complaint, but elected to appeal directly to this Court. The defendants did not file statements opposing jurisdiction, and none of the matters raised herein has previously been presented to the Court. The Court noted probable jurisdiction on November 30, 1953 and transferred the case to the summary docket. Argument is set for February 4, 1954.

II.

Appellant was not prejudiced by the dismissal of its complaint.

Dismissal on July 20, 1953 of the complaint filed on July 31, 1952, did not prevent the Government from filing a new complaint remedying the deficiencies of the first. As stated

[1] Defendants-Appellees are Employing Lathers Association of Chicago and Vicinity; Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity; Harry D. Follett; and Edward D. Chouinard.

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in *United States* v. *Oregon State Medical Society*, 343 U.S. 326, an equity suit under the Sherman Act (p. 333):

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. The sole function of an action for injunction is to forestall future violations. * * * All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur."

Whenever there is a real threat of future violation of the Sherman Act, the Government can meet the threat with a new complaint. Its right and duty to do so [Section 4 of the Sherman Act, 26 Stat. 209; 15 U. S. C. § 4] are neither impaired nor suspended by the dismissal of the first complaint filed.

III.

This appeal presents only a narrow question of the sufficiency of a pleading.

The sole effect of the decision below would be as a precedent in future cases wherein like issues were presented. The only issue determined by the trial court was that the particular complaint before it did not allege that the defendants restrained, monopolized, or intended to restrain or to monopolize *interstate* commerce.

This proposition is so narrow in its scope as to have practically no impact as a precedent. Such decisions are legion, and each turns upon its own special facts.

IV.

As applied to this case, the question posed by government counsel is too insubstantial to need further argument.

In this case the allegations were insufficient to show that the flow of building materials into the Chicago area, the

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only interstate commerce alleged to be involved, was in any way affected by the activities of the defendants. [2]

The materials involved were bought and sold by building material dealers and local plastering contractors, but *not* by the defendants. The only connection between the defendants and the materials was (1) a union lather would hold some of the materials (laths) in one hand and drive others (nails) in with a hammer held in the other hand and, (2) an employing lather would supervise the union lather. The performance of lathing work was not alleged to have been interfered with in any way. The price of lathing materials was not alleged to have been affected in any way. The movement of materials into Illinois from other states was not alleged to have been restricted.

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[2] What the complaint omits is as eloquent as what it alleges.

What it includes may be summarized as follows:

1. Defendants are Illinoisans, and all of their activities occur in the Chicago area.
2. The union represents the men called lathers, whose skilled labor is needed to put laths onto the walls of buildings, before plaster is added.
3. The employing lathers hire and supervise the work of the union lathers.
4. Neither the union nor the employers buy or sell lathing material. They deal only in labor and the service of hiring and supervising labor.
5. The laths and nails to which defendants apply their skills are bought and sold by building material dealers and plastering contractors, but not by the defendants. These materials come from outside of Illinois, and remain for varying lengths of time in Illinois before being built into buildings.
6. The employing lathers deal with plastering contractors. The alleged agreement has the purpose and effect of requiring certain plastering contractors to contract only with the employing lathers who are assigned to work with them.
7. Most plastering contractors are prevented by the alleged agreement from themselves hiring and supervising union lathers. They must contract with employing lathers who perform this function.
8. To qualify as an employing lather, one must first learn and practice the lathing trade for five years as a journeyman member of the union.

(Footnote No. 2 continued on p. 5.)

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The decision below was founded on the most obvious proposition in the whole field of anti-trust law, for nothing is more fundamental than that Sections 1 and 2 of the Sherman Act, foreign trade aside, are concerned only with contracts, combinations and conspiracies which are intended to or do in fact restrain or monopolize interstate commerce.[3]

As the Court recently stated, "* * * if there was no restraint of interstate commerce, the conduct charged does not fall within the prohibitions of the Sherman Act." *United States* v. *Oregon State Medical Society*, 343 U.S.

[3] "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy *in restraint of trade or commerce among the several States*, or with foreign nations, is declared to be illegal: * * *"

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, *to monopolize any part of the trade or commerce among the several States*, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

(Footnote No. 2 concluded from p. 4.)

What the complaint omits may be summarized as follows:

1. Any charge that the defendants' activities have any effect on the cost, volume or quality of building construction, or the cost, volume or quality of lathing materials in the Chicago area.
2. Any charge that the activities alleged reduce the demand for lathing materials, or restrict the supply, impede the transportation, or tend in any way to depress or increase the price of lathing materials.
3. Any charge that the defendants have intended that their arrangement burden the interstate flow, or diminish the local consumption of lathing materials.
4. Any charge that the defendants who work with the materials, have conspired with the building material dealers or with the plastering contractors, who buy and sell the materials, with the purpose or effect of fixing prices, reducing quality, restricting volume, or otherwise burdening or interfering with (1) the performance of lathing work in Chicago and vicinity, (2) the sale of building materials in Chicago and vicinity, (3) the purchase and shipment into Illinois of building materials from other states, or (4) building construction in the area generally.

All of the above omissions are left to the imagination of the Court. The complaint speculates that interstate commerce in lathing and other building materials has been restrained but omits to state any facts bearing out this speculative conclusion.

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326, 338. "The vital thing is the effect on commerce* * *." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 238.

The words "commerce among the several States" had to be used in the statute "to relate the prohibited restraint of trade to interstate commerce for constitutional purposes." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434; *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 547.

It follows, of course, that a complaint which does not allege that the activities of the defendants were intended to or did in fact restrain *interstate* commerce fails to state a claim for which relief can be granted under the Sherman Act, and should be dismissed. *United States* v. *Yellow Cab Co.*, 332 U. S. 218. In the *Yellow Cab* case, although defendants' vehicles conveyed interstate train passengers between their homes and the railroad station in the normal course of their local service, the Court noted that the local taxicab service was "not an integral part of interstate transportation" and said (p. 233):

> "* * * And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act.
>
> "It follows that the complaint, insofar as it is based on such local taxicab service, fails to state a cause of action under the Sherman Act."

One of the requirements imposed upon the Government by Rule 8(a) of the Federal Rules of Civil Procedure was that its complaint contain "a short and plain statement of the claim *showing that the pleader is entitled to relief.*" The motions to dismiss filed by the defendants in the district court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, raised the issue whether the Govern-

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ment's complaint showed that the pleader was "entitled to relief" under the Sherman Act. Since a complaint seeking relief under the Sherman Act is defective unless it contains allegations showing that the defendants intended to or did in fact restrain or monopolize interstate commerce, the district court dismissed the Government's complaint.

The action of the district court in dismissing the government's complaint was not predicated upon any new principle of pleading or any new interpretation of the anti-trust laws. On the contrary, the district judge declined the Government's request that he go beyond the well-defined limits set by this Court, and stated in his memorandum opinion:

> "* * * This Court is bound by the language of the Sherman Act and its subsequent judicial interpretation. * * *" (Transcript of Record, page 24.)

On examining the complaint herein, the district court found that it did not plead any facts showing that the alleged conspiracy of the defendants was intended to or did in any way affect interstate commerce. In its memorandum opinion, the district court said:

> "There is no allegation showing that these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce." (Transcript of Record, page 24.)

Thus recognizing the obvious insufficiency of the Government's pleading when judged by the standards established by this Court, the district court entered its order of dismissal.

No broad question of law was decided. No new interpretation of the Sherman Act was announced. The district court followed the controlling decisions of this Court.

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Levering & Garrigues Co. v. *Morrin,* 289 U. S. 103.

Industrial Association v. *United States,* 268 U. S. 64.

United States v. *Oregon State Medical Society,* 343 U. S. 326.

United States v. *Yellow Cab Co.,* 332 U. S. 218, 228-233.

Apex Hosiery Co. v. *Leader,* 310 U. S. 469.

Kansas City Steel Co. v. *Arkansas,* 269 U. S. 148.

Browning v. *Waycross,* 233 U. S. 16.

Anderson v. *Shipowners Association,* 272 U. S. 359, 363-364.

Hopkins v. *United States,* 171 U. S. 578.

Cf., *United States* v. *Hutcheson,* 312 U. S. 219, particularly concurring opinion of Mr. Justice Stone at pp. 237-243; *United States* v. *Building & Construction Trades Council, et al.,* 313 U. S. 539; *United States* v. *United Brotherhood of Carpenters and Joiners of America, et al.,* 313 U. S. 539; *United States* v. *International Hod Carriers & Common Laborers' District Council, et al.,* 313 U. S. 539, affirming *United States* v. *Carrozzo,* 37 F. Supp. 191 (N. D. Ill., E. D.)

V.

The district court was without jurisdiction and its judgment dismissing the complaint should be affirmed.

This Court has held that a defect in pleading of the nature here involved requires dismissal of a suit for want of jurisdiction. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103.

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The following portions of the opinion in the *Levering* case are equally applicable to the appeal in this case:

> "The question of jurisdiction as thus limited is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits. * * * jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. * * * And the federal question averred may be plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'
>
> * * * * * *
>
> "* * * If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. * * * It follows that the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial * * *."

VI.

Conclusion.

For the reasons set forth herein, Appellee, Local 74, respectfully urges that the appeal in this cause fails to present to the Court any substantial question and should be dismissed for that reason and for want of jurisdiction, or, in the alternative, that the judgment of the district court should be affirmed.

Respectfully submitted,

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Attorneys for Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity.

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